

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELOISE PEPION COBELL et al.)	
)	
Plaintiffs)	
)	
v.)	Civil Action No.
)	96-1285 (RCL)
GALE A. NORTON)	
SECRETARY OF THE INTERIOR, et al.)	
)	
Defendants)	
)	
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)	

**SUPPLEMENTAL REPORT AMENDING THE SECOND AND FOURTH
REPORTS OF THE COURT MONITOR**

I. INTRODUCTION

On August 9, 2001, the Court Monitor submitted the Second Report of the Court Monitor (Second Report) to this Court. On October 16, 2001, the Fourth Report of the Court Monitor (Fourth Report) was submitted to this Court. While the substance of the Second Report dealt with TAAMS development and deployment and that of the Fourth Report dealt with BIA Data Cleanup, both Reports also addressed the preparation, review, and verification process carried out by the Interior defendants for the submission to this Court of each of the seven Quarterly Reports.

Specifically, the Second Report discussed the Special Trustee's addition of the Special Trustee Observations section to the Third and subsequent Quarterly Reports following his assuming his position in the summer of 2000. It reviewed the negotiations over his draft statements of his concerns about the accuracy and completeness of the substance of those Quarterly Reports and how these statements were modified prior to his verification of the Quarterly Reports (*see generally*, Second Report at pages 85 to 94).

He had stated to the Court Monitor that he had stopped providing his verification as subsequently reported in the Second Report:

“He confirmed that he had stopped the practice of “verifying” the Quarterly Reports in his transmittal letters to the DOJ. They had requested that he verify the Quarterly Reports. However, his staff and he were of the opinion that there was too much that they could not confirm the accuracy of in the BIA reports on the subprojects to be able to verify them in

the legal sense of the word.” *Id.* at 104.¹

The Court Monitor commented in the Second Report’s Conclusions and Discussion section on the Special Trustee’s difficulty in placing his comments in the Special Trustee Observations as he or his staff had prepared them by stating:

“The Quarterly Reports have been misleading regarding the true status of the TAAMS project. No adequate description was ever given this Court of the failure by TAAMS to pass the user acceptance and IV&V tests. Every effort has been made to show progress and positive events and suppress negative results when in actuality the system was repeatedly failing in major areas that clearly would set back trust reform by many months if not years.

Only when a new Special Trustee was appointed did any semblance of a true picture of the status of TAAMS begin to be reflected in the Quarterly Reports. However, the opposition of senior DOI and BIA officials, to include attorneys, to the substance of his reports heavily influenced his published Observations. That criticism and opposition as well as the presentation of false and misleading information to the Court continue to the present.” *Id.* at 124.

In the Fourth Report, the Court Monitor addressed the Special Trustee’s refusal to verify the Seventh Quarterly Report and submitted as an exhibit the memorandum of his subordinate’s confirmation to the Solicitor of the Special Trustee’s position on that refusal that stated in part:

“This is to recap and confirm our conversations of 8/31/01. I expressed the Special Trustee’s opposition to the proposed motion to extend the filing deadline for the quarterly report based on the Special Trustee verifying the contents of that report. As I stated in a voice mail message and directly to you with Mike Smith present, the Special Trustee would not verify the report under any conceivable scenario encompassed by the proposed motion. As you are aware, I repeated this to the Solicitor when we met him later in the afternoon.” *Id.* at 4 and Tab 7.

At the time of submission of the Fourth Report on October 16, 2001, the Special Trustee provided to the Court Monitor a memorandum with attachments regarding his cessation of the practice of verifying the Quarterly Reports to more fully explain his reasoning in light of the comments made by the Court Monitor in the Second and Fourth Reports about that change of procedure.

Due to the substance of the memorandum and attachments, it is necessary to supplement the factual presentations made in both of the previous Reports by addressing the Special Trustee’s proffer in this Supplemental Report.

¹ The Special Trustee did verify the Third, Fourth, and Fifth Quarterly Reports.

II. THE SPECIAL TRUSTEE'S MEMORANDUM AND ATTACHMENTS

The memorandum and attachment are provided as an attachment to this Report. The Court Monitor has paginated the document for ease of referral.

A. The Special Trustee's Understanding of the Significance of Verification of the Quarterly Reports

In his memorandum to the Court Monitor, the Special Trustee discusses his reasoning for submitting it to the Court Monitor and first addresses his decision to discontinue verifying the Quarterly Reports:

"The recent reports that you have authored and submitted to Judge Lamberth concerning the progress of trust reform within the Department have commented on the objectivity and, therefore, the usefulness of the Department's Quarterly Reports which have been submitted to the Judge. My Office became responsible for gathering the information that went into those Reports with Report Number 3. *As had been the prior practice, I was asked to verify the Report. I complied with that request. As I became more aware of the possible interpretations of my act of verification, I ceased the practice.*" *Id.* at 1, emphasis added.

His Memorandum to File also addresses his reasoning by stating:

"To the best of my knowledge the word "verify" as used in the transmittal to DOJ and signed by me, was part of language recommended, in fact by DOJ. As I recall the DOJ messages were relayed through SOL.

Based on my understanding of what DOJ wanted, *I believed the use of the word "verify" in these circumstances indicated my belief that our sources of information for the subprojects were reliable.*

I dropped the use of the word "verify" in the transmittal letter after the filing of the Fifth Quarterly Report because I was informed by staff that the word could be interpreted more broadly, viz., to determine or prove the truth, accuracy, and completeness of the information in the Report.

A reading of the Special Trustee's Observations beginning with the Third Report (my first Report) will indicate a growing concern with the Report's completeness, especially regarding BIA data cleanup. In the Seventh Report my Observations clearly reflect a lack of confidence in the completeness of the Report." *Id.* at 2, emphasis added.

While the Special Trustee's memoranda do not add to the picture of the verification process and the reasons for his discontinuing his verification of the Sixth and Seventh Quarterly Reports previously addressed in the Court Monitor's Second and Fourth Report based on interviews with him and his subordinates, confirmation of his memory is supplied by the attachments which also provide further light on the roles of both the Office of the Solicitor and the Department of Justice (DOJ).

B. The Office of the Solicitor

Upon assumption by his office of the responsibility for compiling and submitting the Quarterly Reports to the DOJ in August 2000, an attorney from the Office of the Solicitor, Tim Elliot, provided the Special Trustee with guidance on the substance of the transmittal (cover) letter that would be signed by him. In a memorandum dated August 29, 2000 provided by the Special Trustee, Elliot stated:

“I guess you reached Jim Simon. He asked his people to call me to review the needs for the cover letter for the Quarterly Report. In essence, they need more than a one-liner for two reasons: (1) it will cover their behinds in terms of making representations to the court and (2) a one-liner missing the information from the previous letter will raise high the eyebrows of the court.” *Id.* at 19.

The “one liner” that the Special Trustee initially was prepared to send is at page 18 and was a “surname” copy sent to the Secretary of the Interior’s office.²

Elliot attached the previous transmittal letter submitted to DOJ with the Second Quarterly Report signed by the Assistant Secretary for Policy, Management and Budget. Among other statements in that letter, he highlighted one particular sentence for the Special Trustee by writing by it, “Need this.” That sentence stated:

“However, the Department has exercised great care to verify that the reports are candid.” *Id.* at 20.

Attached also is an August 29, 2000 draft of the proposed letter that states in relevant part”

“As before, we require written input from all of our subproject managers which is then edited, formatted, and, most importantly, verified to the best of our ability.” *Id.* at 22.

Another draft on the next page states:

“As before, we require written input from all of our subproject managers, which is then edited and formatted. We use great care to verify the reports.” *Id.* at 23.

The signed transmittal letter, dated August 30, 2000, includes the Solicitor’s Office’s requested language in the form:

“We use great care to verify the reports.” *Id.* at 15.

There is no indication in any of the attachments that the Special Trustee was advised by the Office of the Solicitor what his verification meant. Elliot’s memorandum addressed the paragraph from which the verification language in the transmittal letter for the Second Quarterly Report came but does not comment on its meaning further than stating:

² To “surname” a report of another department is to concur with its content.

“I suggest, therefore, that we re-do the cover letter by putting meat on it:

- a. Include material from the second paragraph of the cover letter for report no. 2 to the effect that the Department has exercised “great care... .” You might add after this stuff (and I would use the same language as in no. 2) the fact that as ST you are now responsible for preparing the Quarterly Reports and therefore, are advising DoJ of the process you used to prepare the report.” *Id.* at 19.**

B. The Department of Justice

The DOJ apparently had not been satisfied with the transmittal letter for the Third Quarterly Report. In an email, dated August 29, 2000, entitled, “Transmittal memo for 3rd Quarterly Report,” DOJ attorney David Shuey commented at some length on the letter and the substance of the underlying Third Quarterly Report’s Special Trustee Observations:

Harriet, we had our client meeting today - - Sabrina and Steve were here and brought over the surname copy of the 3rd Quarterly with the transmittal memo. It looks like our concerns with the Special Trustee’s observations were addressed (the written rewrites were somewhat difficult to make out) but the transmittal memo that Slonaker has drafted is not consistent with what we have used before from DOI (from PMB) and from what Treasury has provided; it does not provide the level of description of the manner in which the 3rd Quarterly Report was developed that would meet our obligation under FRCP 11

“By presenting to the Court (whether by signing, filing submitting (sic), or later advocating) a pleading written motion OR OTHER PAPER, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances --- (3) the allegations and other factual contentions have evidentiary support or, ... are likely to have evidentiary support after reasonable opportunity for for (sic) further investigation or discovery.”

We have to rely on the ST’s transmittal to provide us with the evidentiary basis for believing the facts in the 3rd Quarterly to be true. This is essential for us to be able to file the document. I will be glad to fax you a copy of what PMB put together for us for the prior Quarterlies and/or Treasury’s submission (Walt Eccard at Treasury would also be glad to speak with the ST about the need for this level of substantiation). *Id.* at 16.

On the next page of the attachments is a memorandum to the DOI Surname Reviewers that states in part:

“Your attention is invited to changes and revised language made in the final report to the Court based on review of the August 22, 2000 draft circulated to the Department of Justice for review:

In the section on the Special Trustee’s Observations revisions are provided in the areas of Probate Backlog, BIA Appraisals, BIA Data Cleanup and TAAMS (page 3).” *Id.* at 17.

The DOJ also had a hand in reviewing the Fourth Quarterly Report and the transmittal letter for that Quarterly Report. In an email, dated November 16, 2000, entitled, “4th

Quarterly Comments,” from DOJ attorney David Shuey to DOI, he states:

“Carrie: attached are the comments I sent to Steve Swanson on yesterday. As we discussed, I would still encourage the attachment of the GAO report on TAAMS to the Quarterly, but we are prepared to file it under a Notice if the DOI decision is not to do so. Also, please remember to email me back a copy of the transmittal that will be coming with the final 4th Quarterly for review; if you are using the one from the 3rd Quarterly as a format, it should be ok.

Jim.Phill: Carrie asked if either of you had individual comments re: the 4th Quarterly. If so, email them either to her directly or to Steve Swanson.” *Id.* at 11.

Jim and Phill were two DOJ attorneys – Jim Simon and Phillip Brooks – who were involved in the representation of DOI in the *Cobell* litigation. Steve Swanson was a DOI attorney also responsible for the *Cobell* litigation.

The Fourth Quarterly Report’s draft transmittal letter is included in the attachments and states:

“We use great care to verify the content of the reports submitted.” *Id.* at 8.

The Fifth Quarterly Report signed transmittal letter is included in the attachments and copies the above statement. *Id.* at 6. The Sixth Quarterly Report transmittal letter, as the Special Trustee indicated to the Court Monitor, dropped of this sentence as well as the entire second paragraph. *Id.* at 5.

II. AMENDMENTS TO THE SECOND AND FOURTH REPORTS

It has never been the position of the Court Monitor that the Special Trustee intentionally verified a Quarterly Report that he knew to be false however inaccurate and incomplete he may have felt it was. He did not have the resources or knowledge initially to determine if the individual reports from subproject managers that his staff was compiling were misleading. The BIA managers assured him they were accurate and that his concerns were ill founded. However, he later became more and more concerned about the accuracy and completeness of these reports as he became familiar with the subprojects and their management and communications problems.

What he has also stated previously and repeats in his present memorandum to the Court Monitor was that he became aware that the term “verify” carried a legal connotation in the context of submitting legal documents to a Federal Court that he was not aware of when first advised to use that language in the Quarterly Reports transmittal letters by the DOI Office of the Solicitor. He was advised of the actual legal standard by a subordinate who is an attorney as well as his Principal Deputy Special Trustee who refused to sign or surname the Quarterly Reports based on his own concerns about their accuracy. Both these officials were interviewed by the Court Monitor during the review of the TAAMS subproject and confirmed the statements of the Special Trustee about their recommendations to him not to further “verify” the Quarterly Reports.

The information supplied by the Special Trustee supports his position that he was never told of the legal standard of the transmittal letter's language that he was supplied with and asked to sign by both the Office of the Solicitor and the DOJ.

Nor is the reason for this Supplemental Report to the Court to change the Court Monitor's previous position that the Special Trustee did not knowingly verify what the Court Monitor has concluded were false, misleading, and inaccurate Quarterly Reports. The reason for this Supplemental Report is the information supplied by the Special Trustee in explaining his verifications. Specifically, the heretofore undocumented involvement of the DOJ in the preparation of not only the transmittal letters but the review of the substance of the Quarterly Reports as well as the involvement of both the Office of the Solicitor and DOJ attorneys in failing to properly advise the Special Trustee on what his legal obligations were regarding those documents.

The significance to the Second and Fourth Reports of this information is that both must be corrected in a material manner.

A. The Second Report

A conclusion of the Second Report was that:

"The Interior Defendants, in their Quarterly Reports to this Court up to the present, have intentionally sought to avoid apprising this court of information regarding the serious deficiencies in the TAAMS system that have delayed and continue to delay TAAMS' implementation and Court-ordered trust reform." *Id.* at 124.

In support of that finding, the Court Monitor stated:

"Only when a new Special Trustee was appointed did any semblance of a true picture of the status of TAAMS begin to be reflected in the Quarterly Reports. However, the opposition of senior DOI and BIA officials, to include attorneys, to the substance of his reports heavily influenced his published Observations. That criticism and opposition as well as the presentation of false and misleading information to the Court continue to the present." *Id.* at 124.

The basis of that statement was the review of the draft Third Quarterly Report's Observations submitted by the Special Trustee that were heavily criticized and edited by Solicitor attorneys and BIA officials. As described in the Second Report at pages 85 to 91, an effort was made to encourage the Special Trustee to drop his Observations all together. When that failed, his draft TAAMS, BIA Data Cleanup, BIA Appraisals, and Probate Backlog statements were heavily edited. But what was not clear at the time of this Report was the role apparently played by DOJ attorneys in reviewing and commenting on their concerns about these same draft Observations. Again, the email language of the DOJ attorney who reviewed the Third Quarterly Report and transmittal letter indicates DOJ involvement with this process:

“It looks like our concerns with the Special Trustee’s observations were addressed...” *Id.* at 16.

And the DOI Note to Surname Reviewers stated:

“Your attention is invited to changes and revised language made in the final report to the Court based on review of the August 22, 2000 draft circulated to the Department of Justice.

In the section on the Special Trustee’s Observations revisions are provided in the areas of Probate Backlog, BIA Appraisals, BIA Data Cleanup and TAAMS....” *Id.* at 17.

These were the same sections of the Special Trustee Observations that had been heavily edited in the Third Quarterly Report.

This information, while unconfirmed at this point as to exactly what the DOJ concerns were and what was edited out of those Observations due to those concerns, requires an amendment to the Second Report. Not only did the Solicitor’s attorneys participate in limiting the information that was provided to this Court of the concerns of the Special Trustee, the DOJ attorneys were aware of this editing process and apparently played some role in it.

Therefore, the Second Report must be amended to reflect that not only did BIA officials and Solicitor attorneys take part in the opposition to the Special Trustee’s efforts to bring transparency to the Third and subsequent Quarterly Reports, but that that opposition and the changes made to the Observations were known to DOJ attorneys. The same DOJ attorneys who required the Special Trustee to verify those Quarterly Reports had likely participated in and were aware of the effort to limit the Special Trustee’s Observations about his concerns over the information in at least the Third Quarterly Report.

Secondly, the requirement that a verification be made in the Quarterly Reports without more involvement of the DOJ in the process of review of the Quarterly Reports and the factual situations on which they were based is not sufficient to satisfy a Rule 11 review. As the Office of Solicitor attorney so cogently opined, DOJ’s need for the verification language was to “cover their behinds in terms of making representations to the court.” *Id.* at 19. They did little more than demand this statement in the Quarterly Reports.

These documents cast doubt on the verification process used by DOJ in submitting the Quarterly Reports to this Court. The blame for the inadequacy of those Reports as addressed in the Second Report must be laid not only at the feet of the Interior defendants but also DOJ.

B. The Fourth Report

DOJ’s method for assuring the accuracy and truthfulness of the Quarterly Reports also casts further doubt on the verification process engaged in by DOJ in submitting the Seventh Quarterly Report to this Court after a month’s delay to, ostensibly, resolve the

concerns of the Special Trustee. The Court Monitor had questioned in the Fourth Quarterly Report why the DOJ would have agreed to less than the previous verification of the Quarterly Report as had been requested anew by DOJ:

“What remains unclear is why the DOJ, having requested that the Interior defendants provided (sic) a senior-level verification of the Seventh Quarterly Report as provided by DOI in the past, accepted at least two alternative methods to obtain certifications by lower ranking subproject managers including accepting a role in a process of interviewing managers on their reports’ “accuracy;” managers who would not provide even the limited certification later agreed to be DOI.: *Id.* at page 24, footnote 16.

DOJ attorneys apparently had paid little attention to these verifications in the past. They had not confirmed the understanding of the Special Trustee about the verification process. Nor had they objected when he did not verify the Sixth Quarterly Report, submitting it to this Court without verification. Why now hold DOI to a higher standard than they had required in the past?

Therefore, the Fourth Report must be amended to reflect that one reason DOI was allowed to engage in a verification process that was described by the Court Monitor as farcical is the lack of standards set by previous and present attorneys within DOJ with regard to DOI’s verification of past Quarterly Reports and the Seventh Quarterly Report. DOJ must share blame for the Seventh Quarterly Report’s false, inaccurate, and incomplete substance based on their own ineffective review of this Quarterly Report and the process for its verification.

Copies of the Supplemental Report Amending the Second and Fourth Reports of the Court Monitor have been provided to:

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Respectfully submitted,

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